

ALTERNATE PROPOSED DECISION

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Ratesetting

Decision **ALTERNATE PROPOSED DECISION OF COMMISSIONER
RECHTSCHAFFEN** (Mailed 7/5/2018)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In The Matter of the Application of
SOUTHERN CALIFORNIA EDISON
COMPANY (U338E) for Authority to Lease
Certain Fiber Optic Cables to CELLCO
PARTNERSHIP D/B/A VERIZON
WIRELESS under the Master Dark Fiber
Lease Agreement Pursuant to Public
Utilities Code Section 851.

Application 17-02-001

**DECISION APPROVING WITH MODIFICATIONS AND ADOPTING
50/50 REVENUE ALLOCATION FOR REVENUES UNDER THE MASTER
DARK FIBER LEASE AGREEMENT BETWEEN SOUTHERN
CALIFORNIA EDISON COMPANY AND VERIZON WIRELESS**

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Summary

This decision approves with modifications the Master Dark Fiber Lease Agreement (Master Lease Agreement) between Southern California Edison Company (SCE) and Cellco Partnership d/b/a Verizon Wireless (Verizon). Any revenues resulting from the Master Lease Agreement will be allocated based on a 50/50 shareholder/ratepayer allocation for gross revenues from leases of fiber optic cables. SCE will submit the individual Lease Route Orders by Tier 1 advice letter to the Commission's Communications Division.

We find that SCE's inventory of dark fiber available for non-tariffed products and services has reached levels beyond what was envisioned under the regulatory scheme in place today for SCE. In light of this, and the growing importance that the communication/ energy nexus plays in advancing numerous state policy goals, we deny the automatic renewal provision in the Master Lease Agreement and note that the Commission may consider opening a rulemaking to examine the most effective utilization of dark fiber throughout California's regulated electric utility infrastructure. We deny SCE's motion for confidential treatment and require that the terms of the Master Lease Agreement and individual Lease Route Orders be made public, given the strong public interest in ensuring competitive access to SCE's fiber network without discrimination.

This proceeding is closed.

1. Summary of Request

Southern California Edison Company (SCE) seeks Commission approval of the Master Dark Fiber Lease Agreement (Master Lease Agreement) pursuant

to California Public Utilities Code Section 851,¹ which provides that a public utility shall not sell, lease, assign, dispose of, encumber the whole or any part of its line, plant, system, or other property necessary or useful in the performance of its duties to the public without the Commission's approval.

Under the terms and conditions of the Master Lease Agreement, SCE will grant an exclusive lease for Cellco Partnership d/b/a Verizon Wireless's (Verizon's) use of certain optical fibers along various cable routes within Southern California. Verizon will submit to SCE Lease Route Orders specifying the circuits and number of optical fibers it will lease, the nonrecurring and recurring rates associated with the lease, payment terms, a map depicting the location of the proposed route indicating the location of fiber route and identifying the portion of the route that will consist of existing fiber and the portion which will constitute new construction, and the technical specifications associated with fiber. In return, Verizon will make initial, non-refundable payments and monthly payments.²

SCE will use existing fiber optic cables when excess capacity is available and, for those portions of the routes that do not have existing capacity, will install new fiber optic cable, perfect land use rights, and construct any necessary

¹ Referred to hereafter as the Public Utilities Code or Pub. Util. Code.

² Pub. Util. Code Section 851 requires approval by Commission order if the transaction is valued at over \$5 million, and allows approval (upon the utility's submittal of an advice letter) by the executive director if the transaction is valued at \$5 million or less. While the value of the individual Lease Route Orders may be less than \$5 million, SCE expects that it could receive 100 to 200 Lease Route Orders over the term of the Master Lease Agreement and that their collective value will exceed that amount. SCE seeks advance approval to execute future Lease Route Orders under the Master Lease Agreement in order to avoid the necessity of filing a separate application or submitting a separate advice letter for each Lease Route Order. SCE notes that the Commission approved similar master agreements in Decision (D.) 02-12-023 and D.02-12-024.

facilities at shareholders' expense. SCE will own, operate, and maintain the entire fiber optic cable, while Verizon will pay for and arrange all connections of its facilities with the fibers that it leases. Verizon is responsible for all taxes resulting from its installation activities and will keep SCE's facilities free from all liens and encumbrances.

SCE seeks to have the revenue under the Master Lease Agreement allocated between shareholders and ratepayers using a 90/10 split pursuant to the revenue sharing allocation adopted in D.99-09-070.

Finally, SCE moves to file the confidential version of its application and Master Dark Fiber Lease Agreement under seal, on the basis of Verizon's declaration that the redacted information contained therein is competitively sensitive, confidential, proprietary, will encourage other potential customers to "cherry pick" the terms and conditions of the agreement and, finally, that the agreement includes Verizon trade secrets.

2. Procedural Background

No protests or responses to the application were filed. A telephonic prehearing conference (PHC) was held on April 17, 2017; no persons appeared other than the applicant. Upon consideration of the application and discussion at the PHC, the assigned Commissioner's scoping memo identified the issues to be determined as follows:

1. Is the proposed lease adverse to the public interest?
2. Does the proposed lease require environmental review pursuant to the California Environmental Quality Act (CEQA)?

As there were no contested issues of material fact, the assigned Commissioner's April 27, 2017, scoping memo determined that evidentiary

hearing was not required,³ and the matter was submitted for resolution based upon the determination of the following issues:

- 1 Is the proposed lease adverse to the public interest?
2. Does the proposed lease require environmental review pursuant to the CEQA?

The assigned Commissioner issued an amended scoping memo on September 11, 2017, to more closely consider whether the proposed lease is adverse to public interest by addressing the following related issues:⁴

1. Does SCE's application meet the requirements for revenue sharing established in D.99-07-070?
2. How does SCE's proposed Master Lease Agreement impact safety and reliability?
3. Does SCE's description of its fiber facilities in this proceeding meet the definition of dark fiber?
4. What effects will SCE's Master Lease Agreement have on the competitive market for telecommunications services in California?
5. With regard to revenue sharing, is the distinction between "dark" and "lit" fiber a meaningful basis for determining the revenue sharing allocation, will existing or new fiber be used to meet Verizon's Lease Route Orders, and will shareholders or ratepayers fund new fiber if any?
6. What steps can the Commission take to ensure that SCE does not subsidize its competitive local exchange carrier (CLEC) business with its electric customers?
7. Should any new rules developed through the Pole Attachment and Right-of-Way (ROW) proceedings (Investigation

³ Resolution ALJ-176-3393 preliminarily determined that evidentiary hearing was needed.

⁴ Sub-issues are omitted from this summary.

(I.) 17-06-027/Rulemaking (R.) 17-06-028/R.17-03-009) be applied to this Master Lease Agreement, if approved?

8. Is SCE's Master Lease Agreement proposal compliant with General Orders (GOs) 95 and 128, applicable local, state, and federal safety regulations, and best safety standards and practices?
9. Should the terms of the Master Lease Agreement and/or Lease Route Orders with Verizon be public under GO 96? If not, why not? Should SCE submit its Lease Route Orders to the Commission?

SCE filed comments on amended scope of issues on October 11, 2017, and The Utility Reform Network (TURN) and the California Cable & Telecommunications Association (CCTA) filed comments on November 10, 2017,⁵ upon which the matter was submitted.

3. Is the Proposed Master Lease Agreement Adverse to the Public Interest?

We do not find that SCE's Master Lease Agreement is adverse to the public interest. The electric investor-owned utilities play an increasingly important role in promoting deployment of advanced communication technology throughout California. The vast network of utility infrastructure, such as utility poles, bring fiber facilities close to customers in urban areas and within reach of customers in remote areas. SCE offering its installed, yet unutilized fiber facilities advances the state's interest in widespread broadband deployment, including in remote and unserved and underserved communities, and this Commission's promotion of robust competition in the broadband market.

⁵ TURN's September 8, 2017, and CCTA's November 8, 2017, motions for party status were granted on October 9, 2017, and November 9, 2017, respectively.

This application brings to the fore important policy questions for the Commission. These include: What policy frameworks promote the most effective utilization of ratepayer funded dark fiber throughout California's regulated electric utility infrastructure? How does the Commission assure that the state's policy priorities, such as safety, universal access to utility services and non-discriminatory access to this infrastructure, are sustained at the increasingly important nexus of electric and communication infrastructure, especially amidst policy changes at the federal level? The Commission may consider opening a rulemaking to examine these broad policy issues, or pursue them within the scope of electric utility general rate cases.

In light of the Commission's interest in revisiting these issues, we do not approve the provision in the MLA that provides for the automatic renewal for successive two-year periods after the initial five-year term of the MLA. SCE shall modify the MLA accordingly and submit a copy to the Communications Division via a Tier 1 advice letter within 45 days of its execution if SCE intends to utilize the MLA.⁶

4. Does SCE's Application Meet the Requirements for Revenue Sharing Established in D.99-07-070?

SCE has not shown that the unused (or dark) fiber that it seeks to lease meets the conditions for non-tariffed products and services established in D.98-08-035. Accordingly, revenues from the proposed Master Lease Agreement are not reasonably entitled to the revenue sharing allocation established in D.99-07-070 for "active" non-tariffed products and services.

⁶ The renewal provision is part of the MLA's definition of "Term" at Article VIII, Section 8.1.

D.97-12-088, as amended in D.98-08-035, adopted the Affiliate Transaction Rules governing the relationship between California's energy utilities and their affiliates and establishing rules and criteria for the energy utilities' marketing of products and services.⁷ Rule VII of the Affiliate Transaction Rules allows the energy utilities to offer products and services on a non-tariffed basis provided that, among other things:

- The product or service utilizes a portion of a utility asset or capacity that has been acquired for the purpose of and is necessary and useful in providing tariffed utility services;
- The product or service will not adversely affect the cost, quality or reliability of tariffed utility products and services;
- The product or service can be marketed with minimal or no incremental ratepayer capital and minimal or no ratepayer liability or risk; and
- the Commission has adopted a reasonable mechanism for treatment of benefits and revenues derived from offering such products and services.

D.99-09-070 adopted a settlement between SCE and the Office of Ratepayer Advocates (ORA) that established a revenue sharing allocation for SCE's qualifying non-tariffed products and services, including a 90/10 shareholder/ratepayer sharing allocation for revenues from SCE's leasing of dark fiber. It is undisputed that the Master Lease Agreement is for dark fiber, and Verizon is responsible for paying for and arranging all connections to enable communications transmission using the leased fiber. As such, revenues from the

⁷ The Affiliate Transaction Rules were later amended in D.06-12-029, but these provisions remained the same.

lease would presumably be subject to the sharing allocation adopted in D.99-09-070, as SCE requests in this application.

However, when the Commission adopted the revenue sharing allocation for SCE's qualifying non-tariffed products and services in D.99-09-070, it was contemplated that the availability of those products and services would stem from only incidentally underutilized utility assets, not from the systematic build-up of assets funded by ratepayers. As explained in D.98-08-035, Rule VII of the Affiliate Transaction Rules as originally adopted in D.97-12-088 restricted the utilities' offerings of non-tariffed product or service to less than 1% of their customer base, "in part, because of our concerns regarding competition, and our concerns that non-tariffed [sic] utility products and services do not increase to an inappropriate magnitude."⁸ D.98-08-035 modified Rule VII and eliminated the 1% limitation, but sought to address these concerns by requiring the utility, in any advice letter seeking authority to offer a *new* product or service, to address the potential impact of that product or service on competition in the relevant market.⁹ Although the modification eliminated any constraint on the potential for a non-tariffed product or service to "increase to an inappropriate magnitude," we did not waiver from the underlying policy and principle that ratepayers should be protected from cross-subsidizing non-tariffed products and services.¹⁰

⁸ The utility respondents to the rulemaking and investigation leading to the Affiliate Transaction Rules adopted in D.97-12-088 described the appropriate products and services as "temporarily available capacity (e.g., space in utility fiber optic [sic] cable) and compatible secondary uses (e.g., leasing land under transmission lines to nurseries)." D.97-12-088, 77 CPUC 422, 485.

⁹ D.98-12-088, 81 CPUC2d 607, 619-620.

¹⁰ See also D.13-05-010 at 1012, "These rules were also designed to protect ratepayers from cross subsidizing non-utility products and services provided by the utilities, and to ensure that the

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The record demonstrates that SCE's non-tariffed dark fiber optic offering has reached a level far greater than that envisioned for non-tariffed product or service (D.97-12-088, as amended by D.98-08-035), and on which the 90/10 shareholder/ratepayer revenue sharing is based (D.99-09-070). According to SCE's witness in SCE's 2018 general rate case (GRC), A.16-09-001, SCE installs enough bandwidth to last the utility for the next 15 to 20 years.¹¹ SCE has added approximately 447 cable miles to its fiber optic network since 2011 (at a rate of approximately 64 miles per year on average), of which approximately 73% (324 cable miles) were at ratepayer expense.¹² As a result, as of October 2017, SCE uses only 17.8% of its fiber optic network for internal communications and electric system monitoring and automation, and 19.1% of the network to provide non-tariffed products and services, including commercial telecommunications service and leasing/licensing of dark fiber to third parties; the remaining 63% of the network is unused capacity.¹³ The Master Lease Agreement reflects the long-term nature of this overcapacity by offering an initial term of five years, and the automatic renewal of successive two-year terms (unless either party gives 90-days' notice of termination), for this non-tariffed product and service.¹⁴ The rules permitting utilities to offer non-tariffed products and services and the

utilities do not use their market position to unfairly compete in areas where the Commission is trying to foster competition."

¹¹ A.16-09-001, SCE/Gooding, 13 RT 1751:2. TURN cites to this information in its comments at 3.

¹² TURN comments, Appendix A, Data Request TURN-SCE-01, Question 03.

¹³ TURN comments, Appendix A, Data Request TURN-SCE-01, Question 01.

¹⁴ Master Lease Agreement, Article VIII, "Term and Termination." The Master Lease Agreement is found in Attachment A to the application in this matter.

revenue sharing allocation established for SCE in D.99-07-070 were not intended to apply to this magnitude of overcapacity of utility assets.

SCE asserts that the revenue expected from the Master Lease Agreement meets the requirements for revenue sharing established in D.99-07-070 because the leasing of dark fiber on SCE's fiber optic system was an existing non-tariffed product or service at the time and because the settlement approved by D.99-07-070 plainly provides that revenues (over a \$16.7 million threshold) from the product or service shall be split 90/10 between shareholders and ratepayers. Regardless, for all the reasons discussed above, it is unreasonable to apply the revenue sharing established in D.99-07-070 to revenue from this magnitude of overcapacity of utility assets funded by ratepayers.

We find that a 50/50 shareholder/ratepayer revenue sharing allocation for gross revenues under the Master Lease Agreement is a more appropriate allocation in this situation. In particular, we are persuaded that this is more likely to promote utilization of the Master Lease Agreement. It is undisputed that SCE's non-tariffed fiber optic offering furthers two important Commission policies: broadband deployment and competition in the broadband market. At the same time, without a broader examination, we do not believe that a revenue sharing mechanism that is slanted more heavily toward shareholders, such as that originally proposed for the Master Lease Agreement, adequately protects the interests of ratepayers.

We acknowledge that there are recent Commission decisions that set shareholder/ratepayer allocation at proportions that differ from what we adopt here. Because the prior decisions do not concern fiber leases, or leasing any

capital asset per se, we do not believe that these precedents are easily applied to the instant case.¹⁵ A rulemaking would provide the most appropriate process to consider the policy implications of different shareholder/ratepayer revenue allocations, including allocations adopted for other non-tariffed product and services.

5. How does SCE's Proposed Master Lease Agreement Impact Safety and Reliability?

SCE states its belief that the Master Lease Agreement does not implicate or expand safety or reliability issues or concerns for SCE facilities because the construction, installation, and maintenance to be performed under the Master Lease Agreement are within the scope of SCE's normal course of business as an electric utility and telecommunications service provider. SCE adds that all existing poles that may be used for this project will be assessed to identify poles requiring repair or replacement in order to meet pole loading safety factor requirements of GO 95. We agree that the Master Lease Agreement does not raise safety and reliability concerns that are not otherwise addressed in existing safety and reliability requirements and SCE's duty to conform to best practices in its normal course of business.

TURN states its concerns that the Master Lease Agreement might overburden or divert shared resources that SCE currently relies on to ensure the safety and reliability of its electric service and its workers, that Verizon's or third-party contractors' access to the leased fiber might impact safety or reliability and that, if any leased fiber is located in the electric supply space, SCE

¹⁵ For example, in D.13-05-010, the Commission adopted a 25/75 shareholder/ratepayer allocation for San Diego Gas & Electric Company's research and development program.

workers will be put at increased risk. The issues of whether SCE is reasonably operating and maintaining its infrastructure in accordance with applicable safety regulations, and properly accounting for its financial and operational activities as required by the Affiliate Transaction Rules, are equally implicated by all of SCE's fiber leases, whether to Verizon or to any other CLEC. They are best addressed in the context of industry-wide safety regulations, the audit of SCE's financial and operational activities required under Rule VI of the Affiliate Transaction Rules, and in SCE's GRCs where the utility is required to demonstrate that it is appropriately allocating incremental non-tariffed products and services costs to ratepayers, and not in the context of an application seeking approval of an individual carrier lease.

6. Does SCE's Description of its Fiber Facilities in this Proceeding Meet the Definition of Dark Fiber?

It is undisputed that the fiber facilities that SCE seeks to lease meet the definition of dark fiber.

The definition of dark fiber in the United States Code of Federal Regulations, Title 47 Part 51, Subpart D, § 51.319 (a)(6) is:

Dark fiber is fiber within an existing fiber optic cable that has not yet been activated through optoelectronics to render it capable of carrying communications services.

The definition of dark fiber in Newton's Telecom Dictionary, 14th ed. (Flatiron Publishing, New York, 1998) 197-98, which the Federal Communications Commission relied on in its Local Competition Third Report and Order [UNE Remand Order], 15 Federal Communications Commission Record at 3771, paragraph 162 note 292, is:

Dark fiber is defined as "[u]nused fiber through which no light is transmitted, or installed fiber optic cable not carrying a

signal.” It is “dark” because it is sold without light communications transmission. The [carrier] leasing the fiber is expected to put its own electronics and signals on the fiber and make it “light.”

The fiber to be leased under this Master Lease Agreement meets both definitions of dark fiber in that it is fiber that will not be activated by SCE, and SCE will not transmit any light or signals over it.¹⁶

7. What Effects will SCE’s Master Lease Agreement have on the Competitive Market for Telecommunications Services in California?

Approval of the Master Lease Agreement will allow SCE to competitively bid on Verizon’s dark fiber leasing opportunities within SCE’s telecommunications service territory. As CCTA notes:

[T]he market for backhaul is a competitive service, and that many of SCE’s competitors for this service also attach fiber and other facilities to SCE’s poles. SCE’s leasing of fiber for backhaul while owning the infrastructure that other competitors must utilize places it in a strategic position that could permit it to limit access to its poles by third parties in order to benefit its own service. Moreover, preferential reservation of space for the electric utilities’ communications infrastructure is difficult to assess where the utility itself controls the timing, the potential make-ready work and eventual access to the pole by other third parties. And it would be nearly impossible to ascertain if certain third parties’ access to poles were delayed in order to prevent or

¹⁶ On page 6 of its application, SCE stated, “SCE is responsible for the construction and maintenance of the cable and its electronics, while Verizon Wireless shall pay for and arrange all connections of its facilities with the fibers Verizon Wireless leases under the Agreement.” SCE filed a motion on November 9, 2017, stating that the use of the phrase “and its electronics” was inadvertent and seeking leave to amend its application to delete it. No objections were filed. The motion is granted.

limit their ability to provide the same competitive backhaul service that SCE intends to provide to a potential customer. (CCTA comments at 3.)

In order to prevent such anti-competitive preferential treatment, CCTA recommends that the Commission extend the application of processing timelines and other ROW rules that the ROW Decision imposes on the incumbent local exchange carriers to SCE.

We reject CCTA's recommendation. To the extent that SCE might inappropriately use its strategic position as electric utility to benefit its role as a competitor in the backhaul market business, that possibility is not a function of the Master Lease Agreement. As CCTA put it in its comments, this concern "raises larger issues associated with nondiscriminatory access to utility infrastructure -- many of which, as the Scoping Memo notes, are teed up for consideration" in the Pole Attachment and ROW proceedings and is "more appropriately considered in [that] industry-wide rulemaking than in the context of an application seeking approval of an individual carrier lease." (CCTA comments at 1.)

7.1. Consistency with Competitive Access Rules and Regulations

Neither the Master Lease Agreement nor the Lease Route Order form included in it contains any terms or conditions that interfere with competitive access to telecommunications infrastructure, non-discriminatory access for carriers as required by the Commission's "right-of-way" decision, D.98-10-058 (ROW Decision).¹⁷ Nor do they contain terms or conditions that contradict the

¹⁷ Although CCTA states that the agreement is generally consistent with the ROW Decision, it asserts that two of the terms in the Master Lease Agreement are more favorable to Verizon than

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non-discriminatory provisions in SCE's Federal Communications Commission tariff.¹⁸

TURN asserts that the Commission cannot assess the Master Lease Agreement's consistency with competitive access rules and regulations without reviewing the specific Lease Route Orders. This assertion only makes sense if the concern is that Verizon will insert into the Lease Route Orders, and SCE will accept, a term prohibiting access to those routes by other carriers in clear violation of the ROW Decision. We address that concern by directing SCE to submit its Lease Route Orders to Communications Division via a Tier 1 advice letter to monitor them to ensure competitive access. Nevertheless, in an abundance of caution, we hereby bar SCE from entering into any agreement under the Master Lease Agreement that prohibits non-discriminatory access to the lease routes entered into with Verizon.

those in SCE's contracts for third party attachments: (1) the Master Lease Agreement provides that SCE will acquire easements needed to allow Verizon's attachments to SCE's poles while, according to CCTA, SCE's contracts for third party attachments require the third party to obtain the requisite easements and pay to rearrange or expand the poles, and (2) the Master Lease Agreement provides that, should the poles used by Verizon become necessary for electric utility operations, SCE will expand the existing capacity at its own cost, while the ROW Decision provides that the third party must pay to rearrange or expand the poles, or the poles can also be reclaimed by SCE outright and the third party must remove its attachments. However, as CCTA further notes, the ROW Decision allows for flexibility depending on the particular circumstances between the parties.

¹⁸ SCE's tariff is available at <https://cdn2.hubspot.net/hubfs/2617781/Tariff.pdf>.

8. With Regard to Revenue Sharing, is the Distinction Between “Dark” and “Lit” Fiber a Meaningful Basis for Determining the Revenue Sharing Allocation, will Existing or New Fiber be Used to Meet Verizon’s Lease Route Orders, and will Shareholders or Ratepayers Fund New Fiber, if any?

8.1. Significance of Distinction Between “Dark” and “Lit” Fiber for Purposes of Revenue Sharing Allocation Under D.99-07-070

We do not reach this issue because we deny revenue sharing pursuant to the revenue sharing allocation adopted in D.99-07-070.

8.2. Existing or New Fiber

As stated in the application and undisputed in the record, both existing fiber funded by ratepayers and new fiber funded by shareholders may be used to meet Verizon’s Lease Route Orders.

8.3. Shareholder or Ratepayer Funding of New Fiber

As stated in the application and undisputed on the record, SCE shareholders would fund any new fiber required to be built under the Master Lease Agreement.

9. What Steps can the Commission Take to Ensure that SCE does not Subsidize its CLEC Business with its Electric Customers?

The issue of what steps the Commission can take to ensure that SCE does not subsidize its CLEC business with its electric customers’ issue also raises larger issues associated with nondiscriminatory access to utility infrastructure, many of which are teed up for consideration in the Pole Attachment and ROW proceedings. It therefore is more appropriately considered in that industry-wide rulemaking and investigation than in the context of this application seeking approval of an individual carrier lease.

The issue of cross subsidization is addressed by the adjustments we have made to the existing sharing mechanism. The 50/50 gross allocation is designed to fairly compensate ratepayers for their investment in fiber capacity. Nonetheless, as discussed above, the consideration of revenue sharing mechanisms for telecommunications service is most appropriately addressed in an industry- wide rulemaking scoped for this issue.¹⁹

10. Should any New Rules Developed Through the Pole Attachment and ROW Proceedings be Applied to this Master Lease Agreement, if Approved?

The question of whether any new, yet-to-be-developed rules in the Pole Attachment and ROW proceedings should be applied to the Master Lease Agreement is best restated as, is there anything in the Master Lease Agreement that would allow or require SCE to be exempt from compliance with any applicable rules or regulations adopted by this Commission? The answer is “no.”

TURN asserts that SCE is using “regulatory double-speak” and a “game of semantics” when SCE says that the Master Lease Agreement is not itself subject to rules regarding utility pole safety and that any new rules that are developed “may potentially” apply to the facilities may become the subject of future Lease Route Orders under the Master Lease Agreement. (TURN comments at 16.) TURN offers no basis for this assertion. The Master Lease Agreement does not address pole specifications or maintenance, and rules have yet to be developed in the Pole Attachment and ROW proceedings. The issue as stated in the Scoping

¹⁹ If not addressed via rulemaking, the Commission may consider reviewing the revenue sharing mechanism for communications services in each of the major electric utilities’ respective rate cases.

Memo sought confirmation that the agreement does not shield SCE from any otherwise-applicable rule or regulation that may be enacted in the future, and we are satisfied that it does not.

11. Is SCE's Master Lease Agreement Proposal Compliant with GOs 95 and 128, Applicable Local, State, and Federal Safety Regulations, and Best Safety Standards and Practices?

The question of whether the Master Lease Agreement complies with GOs 95 and 128 and applicable safety regulations is best restated as, is there anything in the Master Lease Agreement that would impede or exempt SCE's compliance with GO 95 and 128 and applicable safety regulations? The answer is "no."

12. Should SCE Submit its Lease Route Orders to the Commission? Should the Terms of the Lease Route Orders and/or Master Lease Agreement with Verizon be Public Under GO 96? If not, why not?

12.1. Should SCE Submit its Lease Route Orders to the Commission?

SCE asks the Commission to approve this application to eliminate the need for it to submit individual advice letters for approval of individual Lease Route Orders under GO 96-B, in the interest of allowing SCE to respond timely to the individual requests. SCE notes that the Commission has approved similar Master Agreements for SCE to lease communication sites and antenna location to Spring PCS and Nextel.²⁰ SCE suggests that, if the Commission wishes to monitor the individual Lease Route Orders, it might approve the application, but require SCE to submit the individual Lease Route Orders to the Commission as a compliance filing or letter to the Commission's Communications Division.

²⁰ Application at 9, citing to D.02-12-023 and D.02-12-024.

TURN urges the Commission to require SCE to submit: (1) individual Lease Route Orders under an appropriate dollar or mileage threshold as an “informational filing” every quarter; (2) individual Lease Route Orders over that threshold as Tier 2 advice letters under GO 96-B; and (3) notices of construction, of changes to the agreement, plant in service, and ROW related to the agreement, and of any agreement whereby SCE or its affiliate would make direct use of the fiber subject to the agreement; and report all new related construction in a quarterly advice letter as required under SCE’s certificate of public convenience and necessity. TURN maintains that this is appropriate in order to allow the Commission to definitively determine whether the lease request orders will impact safety, reliability, and competitive access to SCE’s facilities, and to ensure that the appropriate revenue sharing mechanism is applied.

With respect to allowing the Commission to monitor the Lease Route Orders to ensure safety, reliability, and competitive access, we direct SCE to submit the Lease Route Order to Communications Division through a Tier 1 advice letter within 30 days of SCE’s receipt of an executed Lease Route Order. The advice letter shall be served on the A.17-02-001 service list and comply with the notice requirements in GO 96-B accomplishes this. With respect to ensuring that the appropriate revenue sharing mechanism is applied, we are satisfied that the 50/50 shareholder/ratepayer revenue sharing allocation that we adopt for gross revenues from Lease Route Orders under the Master Lease Agreement accomplishes this.

12.2. Should the Terms of the Master Lease Agreement be Public under GO 96? If not, why not?

SCE moves to file its confidential version of its Application under seal.²¹ Both the public and confidential versions of the Application contain the Master Lease Agreement as an attachment, but the public version contain redactions of certain terms that fall under one of three categories: (1) the “template” terms and conditions of the Master Lease Agreement that reflect Verizon’s current view on an acceptable risk allocation between the vendor and Verizon, (2) the terms and conditions that deviate from Verizon’s template as a result of negotiations with SCE, and (3) the technical specification of the fiber and service that Verizon is purchasing and the technical details regarding its installation. SCE submits Verizon’s declaration in support of the motion, in compliance with the requirements of D.16-08-024.²² Verizon’s declaration claims the basis for confidential treatment of these three general categories falls under the following sources: the “unfair business advantage” exclusion under GO 66-C, Public Utilities Code Section 583, and California Government Code Section 6254.15.²³

We have reviewed SCE’s motion and accompanying declaration from Verizon and are not persuaded SCE has met its burden to set forth a valid basis for the confidential treatment sought.²⁴

²¹ SCE’s February 3, 2017 Motion for Leave to File the Confidential Version of its Application.

²² Since the submission of SCE’s application, the Commission has clarified and adopted new procedures for requests for confidential treatment, as outlined in GO 66-D, which was adopted in D.17-09-023.

²³ Declaration of Verizon/Jesús G. Román in support of SCE’s February 3, 2017 motion, p. 2.

²⁴ Section 3.2 of GO 66-D states, “An information submitter bears the burden of proving the reasons why the Commission shall hold any information, or any portion thereof, from the public.”

First, Public Utilities Code Section 583, by itself, is not substantive basis for confidentiality.²⁵ As we affirmed in D.16-08-024, this determination was and is based on case law:

As the United States Court of Appeals for the Ninth District noted in *Southern California Edison Company v. Westinghouse Electric Corporation* (9th Cir. 1989) 892 F. 2d 778, 783: “Section 583 does not forbid the disclosure of any information furnished to the CPUC by utilities. Rather, the statute provides that such information will be open to the public if the commission so orders, and the commission’s authority to issue such orders is unrestricted.” Similarly, *In Re Southern California Edison Company* [Mohave Coal Plant Accident], D.91-12-019, 42 CPUC 2d 298, 300 (1991), states that § 583 “assures that staff will not disclose information received from regulated utilities unless that disclosure is in the context of a Commission proceeding or is otherwise ordered by the Commission” but does not limit our broad discretion to determine whether certain information should be disclosed to the public and under what circumstances. (D.06-06-066 at 27, as modified by D.07-05-032.)²⁶

We also cannot rely on Verizon’s claim of “unfair business disadvantage” under GO 66-C. In D.17-09-023, we clarified that for the Commission to provide confidential treatment under Section 583, the substantive basis must rest in the California Public Records Act (CPRA), state and federal law, and applicable privileges, not in GO 66-C.²⁷ Thus, we decline to apply confidential protection to information under the “unfair business disadvantage” exclusion under GO 66-C.

²⁵ D.16-08-024 at 11.

²⁶ D.16-08-024 at 8.

²⁷ D.17-09-023 rejected proposals by certain regulated entities to allow exclusions identified in GO 66-C, including “unfair business advantage,” to continue to apply. The decision confirmed the proper legal basis for exclusions must be found in applicable law. (D.17-09-023 at 43-44.)

We are also not convinced that SCE has met its burden to prove confidentiality under Government Code § 6254.15, which exempts

corporate financial records, corporate proprietary information including trade secrets, and information relating to siting within the state furnished to a government agency by a private company for the purpose of permitting the agency to work with the company in retaining, locating, or expanding a facility within California.

We analyze this claim in the context of the three categories designated as confidential under the Master Lease Agreement. In its declaration, Verizon explains it is “standard practice” that Verizon not disclose its template agreement to any third party unless that third party has first signed a confidentiality agreement. The template “constitutes intellectual property of Verizon that would be of high value to any wireless carrier seeking to compete against Verizon.”²⁸ Verizon similarly seeks protection of those negotiated positions in the Master Lease Agreement that deviate from the template. Verizon states disclosure would place Verizon “at a distinct disadvantage in negotiations with third party vendors if its negotiated agreements become public,” explaining it “would open the possibility that in future negotiations against Verizon, those vendors would seek to cherry-pick provisions to their favor and to make the argument that they are entitled to the same provisions as SCE.”²⁹

We find these explanations fall short of providing the Commission with the necessary justification to grant confidential treatment. Vague assertions that disclosure “would provide value to Verizon’s competitors” or “create additional

²⁸ Declaration of Verizon/Jesús G. Román, p. 1.

²⁹ *Id.* at 2.

difficulties for Verizon in future commercial negotiations”³⁰ is not enough to overcome the strong public interest favoring transparency and disclosure of all records “relating to the conduct of the people’s business,”³¹ and the equally strong public interest in ensuring competitive access to SCE’s fiber network without discrimination. As we noted in D.17-09-023, a claim of confidentiality that only cites a private economic interest is not a sufficient basis for the Commission to withhold information – an information submitter must identify the public interest and not rely solely on private economic injury.³²

Lastly, we do not believe SCE met its burden of proof that the technical specifications and details regarding the installation of the fiber or service in the Master Lease Agreement exhibits merit protection under Government Code § 6254.15. Verizon states that withholding such information compromises the security of telecommunications infrastructure, such as cyber terrorism.³³ Barring any provision of state or federal law prohibiting such disclosure,³⁴ and without further explanation of the perceived harm disclosure of each specified redaction would pose, we do not find support in Verizon’s claims.

³⁰ *Id.*

³¹ The California Constitution states that statutes, court rules, and other authority limiting access to information must be broadly construed if they further the people’s right of access, and narrowly construed if they limit the right of access. Cal. Const. Article I, § 3(b)(2); *see, e.g., Sonoma County Employee’s Retirement Assn. v. Superior Court (SCERA)* (2011) 198 Cal. App.4th 986, 991-922.

³² While D.17-09-023 applied this rationale to claims under the “public interest balancing test” exemption under Cal. Gov’t Code § 6255(a) of the CPRA, we find this reasoning equally applicable to the fact-specific analysis of whether the information constitutes a trade secret or proprietary information under Cal. Gov’t Code § 6254.15.

³³ Declaration of Verizon/Jesús G. Román, p. 2.

³⁴ Cal. Gov. Code § 6254(k) permits the Commission to withhold information if the disclosure of information is prohibited by federal or state law.

Accordingly, the motion for leave to file the Master Lease Agreement under seal is denied.

12.3. Should the Terms of the Lease Route Orders be Public under GO 96? If not, why not?

It is in the public interest to ensure competitive access to SCE's fiber network without discrimination. Requiring SCE to submit Lease Route Order unredacted Lease Route Orders by a Tier 1 advice letter to the Commission helps achieve this objective. GO 66-D provides an appropriate process whereby information submitted to the Commission is presumed to be public, with the burden of proof for confidential treatment on the person or entity submitting the information. GO 66-D also permits the Commission to establish a preemptive determination of confidentiality. Specifically, Rule 3.4(b) of GO 66-D states,

[I]n any proceeding in which the Commission issues a decision requiring the submission of information, the Commission may make a determination of whether the information required by the decision will be treated as public or confidential. In such instance, the Commission will:

- i. Identify the type of information to be submitted, and
- ii. Provide an analysis of the legal authority for the Commission to provide confidential treatment to the specific information.

As discussed above, there is strong public interest in transparency and disclosure of all records "relating to the conduct of the people's business," and an equally strong public interest in ensuring competitive access to SCE's fiber network without discrimination. At this time, we are making a preemptive determination that the executed Lease Route Orders - in its entirety - will be considered public and not confidential. This preemptive determination does not preclude SCE from seeking confidential treatment under GO 66-D of any terms of an executed Lease Route Order upon submission to the Commission.

Should SCE seek confidential treatment of any terms in a Lease Route Order submitted to the Commission and should Commission staff find such protection is reasonable; the Lease Route Order will be made available as submitted. We remind interested parties that they may obtain an unredacted copy of a Lease Route Order by executing a non-disclosure agreement with SCE. (See D.16-10-043)

13. Motion to Amend Application

By motion filed November 9, 2017, SCE seeks leave to amend its application as follows:

- Application, page 1: The reference to D.98-10-058 should be changed to D.98-12-083 in order to correctly reference the decision granting SCE's Certificate of Public Convenience and Necessity to provide telecommunication services as a competitive local exchange carrier.
- Application, page 5, footnote 11: The words "of the Application" need to be inserted to footnote 11 to reflect SCE's position that the application eliminates the need for SCE to file, and the Commission to approve, numerous advice letters if SCE were to classify each Lease Route Order as a single transaction.
- Application, page 6: The words "and its electronics" should be deleted because it suggests that the subject of the application involves lit fiber, when it does not.

The motion is unopposed and we hereby grant it.

14. Assignment of Proceeding

Clifford R. Rechtschaffen is the assigned Commissioner and Hallie Yacknin is the assigned Administrative Law Judge to the proceeding.

15. Public Review and Comment

The alternate proposed decision of Commissioner Rechtschaffen in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Comments were filed on _____, and reply comments were filed on _____ by _____.

Findings of Fact

1. SCE installs enough bandwidth to last the utility for the next 15 to 20 years.
2. SCE has added approximately 447 miles to its fiber optic network since 2011 (at a rate of approximately 64 miles per year on average), of which approximately 73% (324 miles) were at ratepayer expense.
3. As of October 2017, SCE uses only 17.8% of its fiber optic network for internal communications and electric system monitoring and automation, and 19.1% of the network to provide non-tariffed products and services, including commercial telecommunications service and leasing/licensing of dark fiber to third parties; the remaining 63% of the network is unused capacity.
4. The Master Lease Agreement reflects the long-term nature of SCE's fiber optic overcapacity by offering an initial term of five years, and the automatic renewal of successive two-year terms (unless either party gives 90-days' notice of termination), for this non-tariffed product and service.
5. All existing poles that may be used for this project will be assessed to identify poles requiring repair or replacement in order to meet pole loading safety factor requirements of GO 95.
6. The fiber to be leased under this Master Lease Agreement is fiber that will not be activated by SCE, and SCE will not transmit any light or signals over it.

7. Approval of the Master Lease Agreement will allow SCE to competitively bid on Verizon's dark fiber leasing opportunities within SCE's telecommunications service territory.

8. To the extent that SCE might inappropriately use its strategic position as electric utility to benefit its role as a competitor in the backhaul market business, that possibility is not a function of the Master Lease Agreement.

9. The Master Lease Agreement does not contain any terms or conditions that interfere with competitive access to telecommunications infrastructure, non-discriminatory access for carriers as required by the Commission's ROW decision, D.98-10-058.

10. Both existing fiber funded by ratepayers and new fiber funded by shareholders may be used to meet Verizon's Lease Route Orders.

11. SCE shareholders will fund any new fiber required to be built under the Master Lease Agreement.

Conclusions of Law

1. The rules permitting utilities to offer non-tariffed products and services and the 90/10 shareholder/ratepayer revenue sharing allocation established for SCE in D.99-07-070 were not intended to apply to this magnitude of overcapacity of utility assets.

2. In light of the Commission's interest in revisiting issues regarding what policy frameworks promote the most effective utilization of ratepayer funded dark fiber throughout California's regulated electric utility infrastructure, and how to assure that the state's policy priorities, such as safety, universal access to utility services and non-discriminatory access to this infrastructure, are sustained at the increasingly important nexus of electric and communication infrastructure, the provision in the MLA that provides for automatic renewal for successive

two-year periods after the initial five-year term of the MLA is unreasonable and should not be approved.

A 50/50 shareholder/ratepayer revenue sharing allocation of gross revenues from leases under the Master Lease Agreement more reasonably rewards ratepayers for their investment in the infrastructure necessary to offer the services under the Master Lease Agreement, and incentivizes SCE to make available fiber facilities to Verizon.

3. The Master Lease Agreement does not raise safety and reliability concerns that are not otherwise addressed in existing safety and reliability requirements and SCE's duty to conform to best practices in its normal course of business.

4. The fiber facilities that SCE seeks to lease meet the definition of dark fiber.

5. The concern that that SCE might inappropriately use its strategic position as electric utility to benefit its role as a competitor in the backhaul market business raises larger issues associated with nondiscriminatory access to utility infrastructure that are teed up for consideration in the Pole Attachment and ROW proceedings (I.17-06-027/R.17-06-028/R.17-03-009), and are more appropriately considered in that industry-wide rulemaking than in the context of an application seeking approval of an individual carrier lease.

6. Out of an abundance of caution, SCE should be barred from entering into any agreement under the Master Lease Agreement that prohibits non-discriminatory access to the lease routes entered into with Verizon.

7. We do not reach the issue of the significance of the distinction between "dark" and "lit" fiber with respect to the revenue sharing allocation adopted in D.99-07-070 because we deny revenue sharing pursuant to that allocation.

8. Nothing in the Master Lease Agreement requires or allows SCE to be exempt from compliance with any applicable rules or regulations adopted by this Commission.

9. Nothing in the Master Lease Agreement impedes with or exempt SCE's compliance with GO's 95 and 128 and applicable safety regulations.

10. SCE should be directed to submit the individual Lease Route Orders through the Tier 1 Advice Letter process outlined in GO 96-B to the Commission's Communications Division within 30 days of their receipt by SCE.

11. SCE's motion to file its unredacted application under seal should be denied consistent with Public Utilities Code Section 583, GO 66-C, and California Government Code § 6254.15.

12. GO 66-D governs the administrative processes for the submittal and release of confidential information in the Lease Route Orders to be submitted to Communications Division, including the process for considering and resolving any claims of confidentiality.

13. SCE's motion to amend its application should be granted.

14. The Master Lease Agreement should be approved with modifications, subject to the removal of the automatic renewal provision, a 50/50 shareholder/ratepayer revenue sharing allocation of revenues, and conditioned upon SCE's submission of the Lease Route Orders to the Communications Division via advice letter process.

O R D E R

IT IS ORDERED that:

1. Southern California Edison Company is granted authority pursuant to Public Utilities Code Section 851 to lease to Cellco Partnership d/b/a Verizon

Wireless certain optical fibers along existing routes and additional routes that are being constructed in Southern California pursuant to their Master Dark Fiber Lease Agreement dated November 17, 2016, as modified to eliminate the automatic renewal provision as follows:

- 8.1 Term. The term of this Agreement shall commence on the Effective Date and, except as otherwise provided in this Agreement, shall continue in effect for a period of five (5) years (the "Initial Term"). Thereafter, ~~this Agreement shall be automatically renewed for successive two (2) year periods (each such period, an "Additional Term" and, together with the Initial Term, the "Term")~~ unless and until terminated pursuant to Article XII hereof or by either party upon ninety (90) Days' written notice to the other party. Notwithstanding the expiration or termination of this Agreement, each of the terms and conditions of this Agreement shall continue to apply to each Lease Route Order executed by the Parties pursuant to this Agreement that extend beyond the Term of this Agreement.
2. Southern California Edison Company shall submit a Tier 1 compliance filing with a copy of the executed Master Dark Fiber Lease Agreement with Cellco Partnership d/b/a Verizon Wireless within 45 days of its execution.
3. Southern California Edison Company (SCE) shall submit the individual Lease Route Orders pursuant to the Master Dark Fiber Lease Agreement, as modified by this decision, as a Tier 1 advice letter to the Commission's Communications Division at cdcompliance@cpuc.ca.gov within 30 days of their receipt by SCE. SCE shall serve copies of the advice letter on the Application 17-02-001 service list and comply with the notice requirements in General Order 96-B.
4. Southern California Edison Company shall report the incremental costs and gross revenues resulting from the Master Dark Fiber Lease Agreement, as

modified by this decision, with Verizon as a separate line item in the Use of Communications Computing Systems Product/Service Category in its Periodic Annual Report of Utility Non-Tariffed Products and Services that is currently provided to the Commission's Energy Division. A copy this report shall be provided concurrently to the Communications Division via email to the cdcompliance@cpuc.ca.gov mailbox.

5. Revenues from the lease of optical fibers pursuant to the Master Dark Fiber Lease Agreement, as modified by this decision, shall be shared between shareholders and ratepayers by allocating 50% to shareholders and 50% to ratepayers.

6. Southern California Edison Company's motion to file the unredacted version of its application under seal is denied.

7. All Lease Route Orders submitted to the Commission pursuant to the Master Dark Fiber Lease Agreement, as modified by this decision, shall be treated as public for confidentiality purposes. This preemptive determination does not preclude Southern California Edison Company from submitting a claim for confidential treatment of an executed Lease Route Order pursuant to General Order 66-D.

8. Southern California Edison Company's motion to amend its application is granted.

9. Any other pending motions are deemed denied.

10. Application 17-02-001 is closed.

This order is effective immediately.

Dated _____, at San Francisco, California.